DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re:	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

JOINT COMMENTS

Respectfully submitted,

CABLEVISION INDUSTRIES CORPORATION
COMCAST CABLE COMMUNICATIONS, INC.
COX CABLE COMMUNICATIONS, A Division of Cox Communications, Inc.

No. of Copies rec'd 0+9
List A B C D E

Brenda L. Fox
David J. Wittenstein
Michael J. Pierce
DOW, LOHNES & ALBERTSON
1255 - 23rd St., N.W.
Suite 500
Washington, D.C. 20037

January 25, 1993

TABLE OF CONTENTS

RECEIVED

JAN 2 5 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

SUMMARY OF ARGUMENT

When evaluating discrimination claims under Section 19, the Commission must recognize that differences in the prices, terms and conditions of sale or delivery of satellite programming can legitimately reflect benefits to the video programmer and costs to the video distributor. The Commission should adopt a straightforward three-part test for determining unlawful discrimination.

The Commission must recognize that cable operators invest significantly in plant and equipment, piracy prevention and local marketing efforts that HSD and MMDS distributors do not. In addition to these cost differences, programmers charge lower rates to cable operators to recognize the substantial benefits that, for example, large MSOs bring to a programming service. Large MSOs especially benefit new services through an early carriage commitment.

The Commission must clearly establish that Section 19 only prohibits conduct that has the purpose or effect of significantly hindering or preventing distribution of programming. The Commission must also recognize that exclusivity has been an important part of the recent explosion in video programming. The Commission's attribution rule should reflect a meaningful level of control in the programming industry. The Commission must also insure that the discovery process is not abused. The Commission should protect proprietary information submitted as part of the complaint process from disclosure.

Under Section 12, the Commission should summarily deal with claims of coercion when the relative size of the parties involved makes coercion implausible. In addition, the Commission should not unduly limit the ability of a cable operator to provide favorable carriage terms to an affiliated programmer under Section 12. Finally, if the Commission orders mandatory carriage for a Section 12 violation, such carriage should be limited in terms of time period and should be on terms reasonable and customary in the industry. Monetary forfeitures should be also reasonably related to the harm suffered by the aggrieved programmer.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re: Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution and Carriage	))))))))))	MM Docket No. 92-265

To the Commission:

JOINT COMMENTS

Cablevision Industries Corporation, Comcast Cable Communications, Inc. and Cox Cable Communications, a division of Cox Communications, Inc. (the "Joint Parties"), by their attorneys, hereby submit their Joint Comments in response to the Commission's proposal to adopt regulations implementing Sections 12 and 19 of the Cable Consumer Protection and Competition Act of 1992 (the "Cable Act")[1/]

1/ The Joint Parties note that Sections 12 and 19 of the Cable Act are among a number of sections that have been challenged on constitutional grounds in federal court. The Joint Parties believe Sections 12 and 19 will ultimately be invalidated but, for purposes of this rulemaking process, assume the constitutionality of these provisions. These Comments should not be read, however, as a waiver of the right of any of the Joint Parties to challenge these provisions or the regulations promulgated thereunder on constitutional or other grounds.

concerning the regulation of carriage agreements and program access.[2/]

Introduction

The Commission's rules must recognize a number of factors critical to the health and growth of the cable television industry. First, for reasons discussed below, affiliation agreements with large programming distributors, such as major multiple system operators ("MSOs"), are more valuable to cable programming services than similar agreements with smaller distributors. Historically, programmers have paid for this added value by giving major MSOs more favorable terms and conditions than those given to smaller distributors. These more favorable terms and conditions have in turn encouraged major MSOs to carry more services and a wider variety of programming. Restrictions on a programmer's ability to account and compensate for this added value will stunt the growth of new and varied programming, frustrating the Cable Act's purpose, as stated in Section (2)(b): the promotion of a diversity of views and information through video distribution media.

2/ Notice of Proposed Rulemaking, MM Docket No. 92-265, FCC 92-543 (December 10, 1992) ("NPRM"). These Joint Comments are filed by two MSOs with several investments in cable programmers (Cox and Comcast) and one MSO with only a minimal investment in one programmer (Cablevision). The fact that these companies agree on how the Commission should implement Sections 12 and 19 is evidence that vertical integration is not a divisive factor among the distributors in the industry.

Second, large MSOs have been the driving force behind the explosion in new programming. Not only have these MSOs committed valuable channel space to carry new and untried programming, they have consistently provided the funds to develop such programming.3/ If the Commission's rules stifle the incentive to invest, the growth in programming will slow dramatically, again frustrating the Cable Act's goal of increasing program diversity.

Third, vertically integrated cable programmers do not have the marketplace power of, for example, common carriers and should not be subject to similar regulatory oversight. Indeed, it has been the marketplace, rather than regulation, that has been responsible for the recent explosion in programming, programming that has increasingly proved responsive to consumer demand.4/

Fourth, it is implausible that even the largest MSOs have the power to "coerce" popular programming services like ESPN or USA Network in programming negotiations. Instead, most operator/programmer negotiations occur on an arm's-length basis between two sophisticated, mutually-

---

3/ For example, MSO investment has proved critical to the success of C-SPAN, CNN, BET, the Discovery Channel, the Learning Channel and many other sources of diverse programming.

4/ The Joint Parties respectfully submit that no programming service has ever thrived on the mere fact that it was offered by a vertically integrated programmer.

dependent companies, making "coercive" behavior or "retaliation" (for example, by dropping the service) extremely unlikely.

Finally, the Commission must not implement heavy-handed, inflexible rules that only bind cable operators and thus create an unfair competitive advantage for other, unregulated, video distributors. Such rules would not only be unfair, their effect would be to destroy cable's incentive to develop and promote new and more diverse programming.

The Commission must ultimately measure its rulemaking efforts against Congress' clear intention that the marketplace promote "a diversity of views and information through cable television and other video distribution media[.]"[5/] In order to fulfill this mandate, the Commission must not implement rules that shackle the competitive practices or spirited negotiations that characterize the video programming distribution industry.

Summary of Section 19

Section 19 of the Cable Act requires the Commission to enact regulations to prevent vertically integrated satellite cable programmers from engaging in unfair or deceptive practices that have the purpose or

5/ Cable Act, Section 2(b).

effect of significantly hindering or preventing the distribution of satellite cable programming to subscribers or consumers.

Under Section 19, a cable operator with an attributable interest in a programming service may not unduly or improperly influence the sale of such service to its competitors. Moreover, a vertically integrated programmer generally may not discriminate in the prices, terms or conditions of sale among video programming distributors, although the statute identifies factors that can justify distinctions in treatment of such distributors. Finally, with certain exceptions, exclusive programming agreements between cable operators and vertically integrated programming services will only be permitted if they are found to be in the public interest.

Summary of Section 12

The Commission must also enact regulations to implement Section 12 of the Cable Act, which prevents a cable operator from coercing a programming service into providing exclusivity or requiring a financial interest in the service as a condition of carriage. Section 12 also prohibits a cable operator from discriminating against an unaffiliated programmer in favor of an affiliated programmer on the basis of that affiliation.

Analysis

I. Section 19: The Commission Cannot Micromanage the Complex Sales Practices of Vertically Integrated Satellite Cable Programming Vendors

A. The Commission's Rules Cannot Ignore the Existing Competitive Landscape of the Cable Programming Industry

The Commission should, as an initial matter, recognize that existing antitrust,[6/] anti-fraud and consumer protection laws are already a significant part of the competitive landscape for cable programmers.[7/] Adopting burdensome and inflexible rules in addition to these laws will only hinder competition and diversity in the programming market, discouraging innovative programmers and cable operators from trying new ideas and new services.

The Commission must also realize that Section 19 singles out from this competitive landscape without any justification two discrete classes of competitors for regulation -- cable operators and vertically integrated

---

6/ Congress certainly did not intend, nor is there any need for, the Commission to create or enforce rules that go beyond those provided by current antitrust law. As Section 27 of the Cable Act states: "Nothing in this Act . . . shall be construed to alter or restrict in any manner the applicability of any Federal or State antitrust law." In order to avoid creating a legal quagmire, the Commission should be concerned with and sensitive to creating regulations that are consistent with existing antitrust standards.

7/ To illustrate the current reach of the law, TCI's recent attempt to acquire part of Showtime failed when TCI could not obtain antitrust clearance for the transaction.

programmers. Section 19 does not appear to reach other competitors that have the motivation and the ability to discriminate against competing distribution technologies.[8/] In implementing Section 19 against this backdrop, the Commission should recognize that onerous rules applied to only two of many classes of competitors will upset the competitive balance within the video programming industry.

The Commission should also recognize that vertically integrated programmers compete head to head with very successful non-vertically integrated programmers. As the intent of Section 19 is to prohibit vertically integrated programmers from engaging in discriminatory activities that flow from their integrated status, the Joint Parties submit that the Commission treat conduct engaged in by both types of vendors as presumptively lawful. For example, if both vertically and non-vertically integrated vendors offer more favorable rates to large MSOs than to backyard dish ("HSD") distributors, these rates should be deemed presumptively non-discriminatory.

The Commission should also view historical and widespread deal patterns and practices as presumptively

---

8/ For example, telephone companies providing video dialtone service, powerful non-vertically integrated cable programmers such as ESPN, USA Network and Disney, and non-satellite delivered broadcasters each have the ability to discriminate against competing technologies, but appear not to be covered by Section 19.

lawful. Many of these practices have corollaries in neighboring areas, such as the broadcast programming marketplace -- for example, the grant of market exclusivity or the right to terminate the agreement or the service upon the occurrence of certain events. As the programming industry has matured, both vendors and distributors have learned to compromise and make adjustments within the bounds of a negotiated agreement to maximize mutual best interests. The Commission should not attempt to redirect long-standing industry custom.

B. The Commission Should Clarify the "Undue or Improper Influence" Provisions of Section 19

The Commission should, as an initial matter, clarify that Section 19 only prohibits the exercise of "undue or improper influence" by a cable operator upon those programmers in which the cable operator has an attributable interest. While Section 19(b) is somewhat ambiguous, Section 19(c) is the provision that directs the Commission in its implementation of these rules. Because Section 19(c) specifically directs the Commission only to create rules that prohibit a vertically integrated cable operator from exercising undue or improper influence over its affiliated vendor, the Commission should not read Section 19(b) to expand these rules to non-vertically integrated operators, as this conduct is already limited by antitrust law.

Similarly, the Commission should find that "coercion" under Section 19 and "undue influence" under Section 12 are the same conduct, simply directed at different parties. Section 19 prohibits a cable operator from exercising undue or improper influence upon an affiliated programmer while Section 12 prohibits that same operator from coercing a non-affiliated programmer. Most important, however, the Commission should establish that a finding of either "undue or improper influence" or "coercion" will be limited to extreme conduct, well outside the bounds of normal negotiating activity.[9/]

C. Differences in Prices, Terms and Conditions Can Legitimately Reflect Benefits to the Programmer and Costs to the Distributor

When evaluating discrimination claims under Section 19, the Commission must consider the mechanics of the marketplace and recognize that differences in the prices, terms and conditions of sale or delivery of satellite programming (hereinafter, "PTC") can and usually do legitimately reflect both benefits to the programmer and costs to the distributor. Despite the complex nature of this analysis, the Joint Parties propose a straightforward

9/ The Commission should acknowledge that the activity prohibited under Section 19(2)(c)(A) (undue or improper influence) simply mirrors that conduct prohibited under Section 19(2)(c)(B) (discrimination). In other words, a vertically integrated programmer would be unlikely to discriminate unless its owner MSO(s) exercises undue or improper influence.

three-part test for determining unlawful PTC discrimination.[10] Under this test, the Commission must ask:

1. Were there material differences in the PTC offered after good-faith negotiations by the vertically integrated programmer to the complaining distributor and those offered to other similarly situated distributors?

2. Were the differentials justifiable or did they constitute unwarranted discrimination between satellite cable programming distributors?

3. Was the purpose or effect of such unwarranted discrimination to significantly hinder or prevent the distribution of satellite cable programming to subscribers or consumers?

The first prong of the test involves a factual determination that a vertically integrated programmer has offered <u>materially</u> different PTC to similarly situated distributors. The Commission should not waste valuable administrative resources evaluating insignificant or inconsequential differences in PTC.

10/ None of the four standards that the Commission proposes for determining whether a difference in PTC constitutes unlawful discrimination takes into account the nature of the cable programming industry. It would be inappropriate for the Commission to apply standards to video programmers developed either for common carriers, the chain store marketing industry or companies engaged in international dumping. As a result, the Joint Parties respectfully submit that the Commission forsake these options in favor of the three-part analysis outlined in these Comments.

Under the second prong of the proposed test, the Commission would consider the "justifying" factors enumerated in Section 19(c)(2)(B), plus other factors such as superior negotiating skills or strategies. In particular, the Commission would analyze differences in "the cost of creation, sale, delivery or transmission of satellite cable programming" at both the programmer level and at the distributor level.[11/]

For example, cable operators invest significant amounts in plant and equipment, piracy prevention and local marketing efforts that HSD and MMDS distributors do not. These investments drive the increased penetration levels that most directly benefit a programming service, particularly an advertiser supported service. Cable operators also devote significant resources to customer service in an effort to retain subscribers and maintain high penetration levels. Again, these and other distributor investments enhance a service's potential for success and provide considerable value to the programmer.

In addition to cost differences, the Commission must examine the direct and legitimate economic benefits to a programmer that are "reasonably attributable to the number

---

11/ The legislative history makes clear that the cost analysis should consider costs to both programmers and distributors. 138 Cong. Rec. S16,671 (daily ed., Oct. 5, 1992) (colloquy between Sen. Kerry and Sen. Inouye).

of subscribers served by the distributor." Not only does a major MSO offer a large number of subscribers, it often offers subscribers concentrated in major metropolitan markets. Advertisers will not pay a programmer the same amount to reach even a comparable number of viewers dispersed among rural communities. Moreover, an MSO with high penetration rates can deliver an entire metropolitan area -- and its attendant buying power -- unlike an HSD distributor. Even the opportunity to engage in a co-operative marketing program with a large MSO, which offers the programmer the ability to control the consumer positioning and promotion of its service, is an important and not easily quantifiable benefit that justifies different treatment in the affiliation agreement.12/

Large distributors benefit new services in even more dramatic ways. For example, a major MSO's commitment to carry a new programming service early in the service's rollout can establish momentum and credibility for a

---

12/ Moreover, Section 19(c)(2)(B)(ii) requires the Commission to consider the actual and reasonable differences in the cost of, among other things, the sale of programming. The Commission should recognize that it is considerably less expensive for a programmer to sell to a single MSO rather than a number of smaller distributors. The programmer only has to engage in one negotiation, administer one contract, send one bill (or engage in one set of collection efforts) and deal with one marketing group.

fledgling network.[13/] In addition, a system that carries a new service creates competitive and political pressures on adjoining systems to carry the service as well. Finally, when a large MSO signs up to carry a new service, its commitment to provide instant revenue can be used by the programmer to secure financing, create or acquire programming, market the programming to smaller distributors and hire employees.

Finally, with respect to the third prong of the proposed test, the Joint Parties support the Commission's determination that the Cable Act only prohibits allegedly discriminatory conduct that has the purpose or effect of hindering significantly or preventing the distribution of satellite cable programming to subscribers or customers.[14/] See Cable Act, Section 19(b). As the Commission states, this is a "critical threshold requirement under the statute." Consequently, the third prong of the Joint Parties' proposed test requires the Commission to find evidence of anticompetitive intent or effect.

A mere difference in terms between contracts, even if significant, does not necessarily have the effect of

---

13/ For example, when CNBC was launched in competition with FNN, CNBC's ability to sign agreements early with two major MSOs (one of which was one of the Joint Parties) was critical to CNBC's success.

14/ NPRM at 7 (paragraph 10).

significantly hindering or preventing a distributor from program distribution. In many businesses, different distributors pay different wholesale prices or agree to different terms, without any crippling competitive effect. For example, in the cable programming industry, programmers regularly offer large distributors volume discounts. The Commission must acknowledge that these discounts reward large cable operators for the legitimate economic benefits that they bring to programmers. The Commission must also recognize that volume discounts do more than simply favor large MSOs. Far from hindering or preventing distribution, volume discounts encourage wider carriage, which enhances a programmer's advertising revenues and thus helps keep license fees down for <u>all</u> distributors.

The Commission must also recognize that no programming agreement is negotiated in a vacuum and that distributors themselves undertake a complex analysis when negotiating large numbers of programming agreements. The Commission should not lightly conclude that a distributor has been hindered <u>significantly</u> or <u>prevented</u> from providing programming simply because of differences in the terms of its programming contracts.

D. The Commission Must Recognize That Exclusivity Has Been A Cornerstone of Competition and Productivity In the Entertainment and Media Industries

The Commission must not more narrowly constrain exclusive contracts than it has to under Section 19. As the Commission notes, there are times when exclusivity is "essential" to encourage programming diversity.[15/] The Joint Parties therefore urge the Commission to recognize in its rules that exclusivity is a legitimate and time-honored business tool within the programming industry.

Specifically, offering exclusivity enhances the ability of new services to gain access to crowded channel lineups. Large MSOs, important to a new service's success, are more willing to take risks on an upstart service, both in early and later years, if exclusivity is available.

In addition, the Commission must not lose sight of the fact that exclusivity is often the end-product of negotiations between a programmer and a distributor. A distributor may win exclusivity from trading points, making concessions or offering added benefits to the programmer. At times, exclusivity simply results from better negotiating, regardless of leverage. These are not evils

---

15/ NPRM at 19 (paragraph 36). For example, Turner Broadcasting System was able to assure a successful launch for a new programming service, TNT, in part by offering limited exclusivity to charter affiliates.

that the Commission must "correct;" this is constructive negotiation that should not be discouraged.

In response to the Commission's request for comment on the appropriate definition of a "served area" for purposes of permitting exclusive contracts,[16/] the Commission should establish that the area "served" by a cable operator includes areas for which the operator has received authorization to build or operate by a franchising authority, or which the cable operator is likely to build within a period of two years based on advanced negotiations with a franchising authority. Exclusivity for some programming services may be an important element of a business plan designed to bring cable service to an unserved or underserved area. Cable operators must be able to make a "public interest" showing to justify exclusive contracts in those areas in which significant capital expenditures are pending.[17/]

16/ NPRM at 17 (paragraph 29).

17/ As a way of encouraging the rapid development of multichannel service in unserved areas, the Commission should permit "conditional exclusivity." For example, a programmer may offer a cable operator exclusivity in an area on the condition that the operator becomes the first multichannel video distributor to build in that area and offer the programmer's service. If, in contrast, an MMDS distributor were the first to begin operation in the area, the cable operator would lose its exclusivity rights there. In effect, this conditional exclusivity would hasten the arrival of multichannel video service to the affected area.

The Commission's rules should also recognize that certain types of exclusive contracts entered into between June 1, 1990 and the effective date of the Cable Act are not anticompetitive and should, therefore, be grandfathered. Such contracts include exclusive agreements involving new or less popular services, contracts with exclusivity of five years or less, and programming agreements for services for which there are broadcast or nonbroadcast alternatives with similar programming.[18/] MSOs have, in many cases, agreed to pay higher rates to programmers in exchange for these exclusive contracts. Eliminating this bargained for benefit will leave cable operators paying the higher rates without receiving the corresponding advantage of exclusivity, denying them the benefit of negotiated bargains that were entered into lawfully and in good faith.

In addition, the Commission should establish that certain new exclusive programming agreements are presumptively in the public interest.[19/] For example, new services breaking into the crowded cable market that offer

---

18/ The Joint parties submit that none of the restrictions created by Section 19, including those affecting exclusivity or the prices, terms or conditions of sale or delivery, should be applied retroactively against existing contracts. See NPRM at 16 (paragraph 27).

19/ Competing distributors may use new service exclusivity as a way of differentiating themselves. Because it is a way of distinguishing oneself, a distributor may be more inclined to invest in a new service if it knows that it will have the exclusivity for a reasonable period of time.

"charter affiliate" exclusivity for a sufficient amount of time necessary to increase programming diversity are clearly serving the public interest by increasing programming diversity.[20/] In addition, exclusivity offered to all distributors on publicly announced terms, with the offer open for a reasonable period of time, should be presumptively lawful. Similarly, exclusivity offered by a programmer with a strong competitor in the same programming niche should be presumptively legitimate, as such exclusive contract would not bar consumer access to similar programming.[21/]

The Commission should establish prospectively that the types of exclusive contracts discussed above are permissible. Commission reliance on the complaint process will seriously disrupt the cable programming marketplace.

20/ For example, a period of exclusivity of as little as five years in these circumstances poses little risk of competitive injury to a competitor. On the contrary, the charter affiliate distributor is rewarded with exclusivity during the period when the new service is little-known and unpopular. By the time the service is established, the original distributor loses its exclusive rights. Thus, short periods of exclusivity do not substantially foster diversity of programming, and longer periods would be needed to make a meaningful contribution to programming diversity.

21/ For example, SportsChannel should be able to sign exclusive contracts; though it is vertically integrated, it is weaker than its main rival, non-vertically integrated ESPN. As a result, an exclusive SportsChannel contract is unlikely to pose a competitive threat.

Finally, the Commission must avoid or limit the effect of an apparently anomaly in the Cable Act: that only cable operators and vertically integrated programmers are prohibited from entering into exclusive contracts under Section 19. If, for example, telephone companies providing video dialtone, DBS operators and broadcasters are permitted to enter into exclusive contracts, cable operators should be able to as well. Alternately, if cable operators are significantly restricted in their ability to enter exclusive agreements, other competing technologies should be similarly restricted. The Commission must be careful not to upset the industry's competitive balance.

E. The Proposed Attribution Rule Does Not Reflect a Realistic Level of Control Within Vertically Integrated Satellite Cable Programming Ventures

The Commission's rules should recognize that MSO investment in new -- and sometimes foundering -- programming services has created the greatest expansion in programming diversity in television's history.[22/] Restrictive or inflexible rules that limit MSO incentives to invest will simply halt this growth. The Joint Parties, therefore, encourage the Commission to adopt a rule that arm's length negotiations that result in a cable operator's investment

22/ CNN, the Discovery Channel and BET are but a few examples of foundering programming networks that have been successfully rescued by MSO investment.

interest in a programming service do not create an "attributable interest" where the operator functions essentially as a typical investor that does not have any management control.

The Joint Parties further submit that the proposed 5% broadcast standard ownership interest completely misses the level at which a cable operator has any meaningful influence over a programmer. In the broadcast industry, there are relatively few broadcast outlets per market and licensees often take pronounced editorial positions. Neither of these reasons for the attribution rules exists in the cable industry. While the broadcast standards guarantee editorial diversity within a market, the proposed cable operator/programmer standards simply identify potentially anticompetitive situations for regulatory oversight. The Joint Parties submit that an ownership interest requirement somewhere in the range of 10% to 20% would be sufficient to identify potentially anticompetitive actors.[23]

23/ The Commission has recently proposed raising the broadcast attribution standards to 10% for individual investors and 20% for institutional investors. See Notice of Proposed Rulemaking, MM Docket No. 92-51, 7 FCC Rcd 2654 (1992). It would be anomalous if, in the future, the broadcast standard were raised to 10% while the cable attribution standard remained at 5%. Whichever cable attribution standard the Commission implements, there are no justifiable circumstances under which the cable standard should be lower than the broadcast standard, and any increase in the broadcast standard should be accompanied by a reevaluation of the cable standard.